Virginia Electric and Power Company *and* International Brotherhood of Electrical Workers, AFL-CIO. Case 5-CA-12356

February 22, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 13, 1981, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the Charging Party and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.

1. We agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act when Supervisor Jean Jackson told employee Tanya New that she was not promoted to the position of backup clerk because of her union activities. However, unlike the Administrative Law Judge, we also find that Respondent violated Section 8(a)(3) and (1) of the Act when it based its decision not to promote New on her union activities.

The events surrounding this violation took place in late 1979 and early 1980.[2] A contract existed between Respondent and the Utility Employees Association (UEA), covering about 3,300 office, technical, and professional employees. However, during this time period, a movement against the UEA began developing in Respondent's Alexandria and Norfolk, Virginia, facilities. A bookkeeping employee in the Norfolk office, Tanya New, contacted officials from the International Brotherhood of Electrical Workers (IBEW) to come talk to employees about organizing. New then became the most active IBEW backer at the facility. She solicited signatures, planned meetings, and generally tried to arouse interest in the IBEW. New's response to an open letter to employees, criticizing the signing of IBEW authorization cards, was placed on a general bulletin board and management became aware of it. Word of New's IBEW organizational efforts spread rapidly and her name became associated with the IBEW campaign. It is undisputed that Respondent knew her to be a primary IBEW supporter and promoter.

On January 1, 1980, Concetta Warren, who had held the position of backup clerk was promoted to senior clerk. Warren testified without contradiction that her supervisor, Jean Jackson, told her that Jackson had been told by the district manager that Warren would not be promoted to senior clerk because of her IBEW activities, including the wearing of a union button. Warren said that Jackson told her "as a friend that it would be a good idea if I stopped talking, stopped being so outspoken for the union and stopped wearing my button, if I wanted a promotion." Warren became "angry and disappointed," and therefore removed the button and "did stop talking about it, so outwardly anyway." She was made senior clerk and again started wearing the button, as she has done continuously since. The incident involving Warren is not alleged in the complaint.

When Warren was promoted to senior clerk, a vacancy was created for backup clerk. The job involved no pay increase, but was considered desirable nonetheless because it enhanced the likelihood that the employee who worked as backup clerk would be promoted to the position of senior clerk. Tanya New considered herself a good candidate for the job since she had worked previously with Concetta Warren, whom she would be assisting as backup clerk. New was not given the promotion, however, and when she asked her supervisor, Jackson, why she had been passed over, Jackson said,

[1] Both the Charging Party and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(1) of the Act by restricting union activities on employees' breaktime, we do not rely on his reference to Studds' prehearing affidavit, in sec. III, 1, par. 2, of his Decision inasmuch as that affidavit was not admitted into evidence.

Further, in adopting the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(3) and(1) of the Act by failing to select David Clements for the position of service coordinator trainee, we do not rely on his citation in sec. III, 4, par. 4, of his Decision, of *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] v. *N.L.R.B.*, 365 U.S. 667 (1961), inasmuch as that case is inapposite.

In adopting the Administrative Law Judge's finding that Respondent did not violate the Act by removing employee Jennifer Atchison from a desired job assignment, Member Jenkins notes that counsel for the General Counsel stipulated that Atchison's activities in protest of alleged sexual harassment had "nothing to do with this case."

[2] The facts set forth concerning this violation are those found by the Administrative Law Judge or uncontradicted facts from the record.

inter alia, that management did not want her working too closely with Warren, and that since New had worked so hard with the IBEW campaign they did not want to put any more of a strain on her.

Respondent does not dispute the fact that Jackson told New she was not promoted in part because of her union activities. Obviously, this fact is *prima facie* evidence of unlawful discrimination. Nor does Respondent offer any convincing evidence that New would have been denied the promotion absent her union activities. Respondent does assert and the Administrative Law Judge found that Arnetta Galvin, the employee who was given the job, and New were "equally active unioneers," and thus Respondent's choice of Galvin eliminated the possibility of any discriminatory motive. However, it is clear from the record that New was a primary and active IBEW organizer, a fact well known to Respondent, while Galvin's only known union activity was the wearing of an IBEW button. Moreover, it is well settled that an employer need not discriminate against all union activists or supporters before the General Counsel can establish discriminatory intent. See, e.g., *Challenge-Cook Brothers of Ohio, Inc.*, 153 NLRB 92, 99 (1965), enfd. in relevant part 374 F.2d 147 (6th Cir. 1967); *Ballard Motors, Inc.*, 179 NLRB 300, 307, fn. 26 (1969); and *Barnes and Noble Bookstores, Inc.*, 237 NLRB 1246, 1249 (1978). Accordingly, Respondent has not rebutted the General Counsel's *prima facie* showing of unlawful discrimination and we find that Respondent discriminated against employee New because of her union activities in violation of Section 8(a)(3) and (1) of the Act.[3] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).[4]

2. Unlike the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) of the Act when Supervisor Marian Trenis told employee Robin Van Burin that she would prefer that Van Burin not wear her IBEW button while working in the lobby area of Respondent's facility in Alexandria, Virginia. The Administrative Law Judge found the lobby to be the only place where the public is received and Respondent had a right to keep employees' quarrels about unions away from its customers. The Administrative Law Judge further reasoned that, because employees were allowed to wear buttons in all other areas of the plant, Respondent's preference that they not be worn in the lobby area was reasonable.

It is well settled, however, that mere contact with customers is not a basis for barring the wearing of union buttons, and that such a restriction on the wearing of union insignia or buttons constitutes a violation of Section 8(a)(1) of the Act in the absence of substantial evidence that the button affected Respondent's business or that the prohibition was necessary to maintain employee discipline.[5] Here, there is no evidence of any such "special circumstances." Thus, Respondent has not established that the IBEW buttons were in any way provocative, detracted unreasonably from the customary decorum of Respondent's lobby, or caused a diminution in Respondent's business. Accordingly, we find that Respondent, by its supervisor's remark to employee Van Burin, has unlawfully interfered with Van Burin's right to wear a union button and insignia at work and has violated Section 8(a)(1) of the Act.[6]

CONCLUSIONS OF LAW

1. Virginia Electric and Power Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employee Tanya New that she was denied a promotion because of her union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By urging employee Robin Van Burin not to wear her union button while working in the lobby of its Alexandria, Virginia, facility, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By refusing to promote employee Tanya New to the position of backup clerk because of her union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Virginia Electric and Power Company, Alexandria

[3] Because the promotion that was illegally denied New involved no raise in salary, we will not include a backpay provision in our remedial order.

[4] Member Jenkins does not rely on *Wright Line*, because Respondent has offered no legitimate reason for the failure to promote New.

[5] *Eckerd's Market, Inc.*, 183 NLRB 337 (1970); *Consolidated Casinos Corp. Sahara Division*, 164 NLRB 950 (1967).

[6] *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963).

and Norfolk, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that they were not promoted because of their union activities.

(b) Urging employees not to wear union buttons or insignia while working in the lobby at its facilities.

(c) Refusing to promote, or otherwise discriminating against, employees for their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to promote Tanya New to the position of backup clerk or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Post at its Alexandria and Norfolk, Virginia, facilities copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT tell employees that they were not promoted because of their union activities.

WE WILL NOT urge employees not to wear union buttons or insignia while working in the lobbies of our facilities.

WE WILL NOT refuse to promote or otherwise discriminate against employees for their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer to promote Tanya New to the position of backup clerk or, if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

VIRGINIA ELECTRIC AND POWER COMPANY

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this case was held on March 25 and 26, 1981, at Norfolk, Virginia, on complaint of the General Counsel against Virginia Electric and Power Company, herein called the Respondent or the Company. The complaint issued on August 12, 1980, upon a charge filed on June 30, 1980, by International Brotherhood of Electrical Workers, AFL-CIO, here called the Union. The issues presented are whether the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Briefs were filed after the close of the hearing by the General Counsel and by the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Virginia corporation, is engaged in the sale and transmission of electrical energy to customers in several States. During the 12-month period preceding issuance of the complaint, a representative period, it received gross revenues in excess of $500,000. During the same period, it purchased and received in interstate commerce products valued in excess of $50,000 directly from points located outside the Commonwealth of Virginia. The Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *A Picture of the Case*

Virginia Electric and Power Company operates throughout three States, with a total of about 10,500 em-

ployees. For many years the International Brotherhood of Electrical Workers (IBEW) has represented a unit of about 4,300 of these employees under successive collective-bargaining contracts; that unit, or units, embraces operations and maintenance workers. Also since 1946 the Utility Employees Association (UEA), apparently an independent union, has represented about 3,300 other employees in a unit of office, technical, and professional employees. The coverage of each of these union contracts extends over very many locations spread all over the three States. A contract between the UEA and the Respondent was placed in evidence; by its terms it covers the period October 31, 1980, to September 29, 1981. The contract also bears the date December 5, 1979. There is no explanation on this record as to why this date is printed on the agreement. I suppose this means the parties were in negotiations between December 1979 and October 1980 towards renewing their earlier, expired or expiring contract. In any event, it is clear the UEA's representative status was never impaired throughout this period.

In late 1979 and early 1980 there developed among some office employees at the Norfolk and Alexandria, Virginia, offices of the Company a move aimed at unseating the UEA as bargaining agent for the salaried employee unit. At best, it would appear, about 200 employees signed cards favoring the IBEW. The General Counsel asserts, partly via the complaint in this proceeding, that during the 6-month period preceding the filing of the charge by the IBEW on June 30, 1980, the Respondent took certain discriminatory action against three of the then pro-IBEW employees illegally aimed at curbing their activities in favor of that Union. The incidents involved are minor in nature, two of them not even said to involve any change in pay. One employee, an ordinary office clerk among many, desired to be a backup clerk; this involved being used occasionally—maybe 1 hour each day—to help a senior clerk, who sometimes cannot keep up with her own duties. Another employee—also a woman—who regularly works on the telephone all day dealing with customer complaints and inquiries desired to be used once in a while as a substitute switchboard receptionist in the front office, where she sometimes did work because the regular switchboard operator was out to lunch or had to go to the toilet. She was told one day that she would not be used that way anymore. The extent of the discrimination, if such it was, is illustrated best by the remedy which the General Counsel seeks in her case. He asks that the Respondent be ordered to use her "occasionally" on the switchboard. One man, according to the wording of the complaint, was actually denied a promotion from regular clerk to senior clerk—a change which would have raised his pay.

Apart from these three incidents, upon which it is alleged that the Respondent violated Section 8(a)(3) in its treatment of these three persons, there is one further direct allegation that should be mentioned at the outset, for it points to a relevant and complicated aspect of the whole case. In June 1980 the Company announced what it called a "clarification" of its sick leave policy affecting all employees covered by the current UEA contract, plus other salaried employees not covered by any collective-bargaining agreement. The UEA contract never included any provision concerning sick leave benefits. Prior to that date, whatever the company policy may have been, the decision in every instance in which sick leave claims arose was left to the discretion of the particular supervisor involved. The new policy, while still somewhat ambiguous, lessened the discretionary authority of the supervisor and gave a little more definitiveness to whatever the policy would thereafter be. The complaint alleges by announcing this new policy the Respondent violated Section 8(a)(3). Since the charge underlying the complaint was filed by the IBEW, and since all the evidence adduced by the General Counsel involves union activity by *those* particular employees who support the IBEW, I must assume the complaint intended to allege that the announcement of the sick leave clarification at that particular time was unlawful discrimination, and therefore violative of Section 8(a)(3) *vis-a-vis* these pro-IBEW employees. I am not at all sure, as the General Counsel contends, that the new policy in fact decreased the sick leave benefits of past years. The documents do not establish that fact clearly, for they speak only in terms of possible alternatives permissible maximums and minimums. But the General Counsel does assert directly in his brief that the Respondent did this "to punish employees for supporting the IBEW."

Would an employer, seeking to dissuade 200 of its employees from any desire to change unions, so punish over 3,000 employees—to say nothing of other unrepresented employees—still represented by the union it, the employer, favors? The UEA filed a charge with the NLRB right after this happened, alleging that the Company had violated Section 8(a)(5) by bypassing the UEA. That charge is still pending; nothing has been done about it yet by the Board's Regional Office. If the Respondent deliberately deprived these IBEW-minded employees of benefits long enjoyed, it did the same thing to the much greater number of other employees in all its locations dispersed throughout three States. With the much greater effect of such discriminatory action—if indeed it was punitive at all—being to discredit the UEA, the net result of the move would be to urge the rebellious group all the more to want to change unions. It is difficult to believe such could have been the Respondent's motive.

B. *Specific Issues*

1. Breaktime

Employee Julie Studds testified that at a group meeting with a number of employees her supervisor, Peggy Kincheloe, said that "no one had been fired, and no one would be fired" because of union activities. The witness also quoted the supervisor as saying that "we were allowed to form or join any union that we wanted . . . on our own lunch hour, or after 5:00 and not on our breaks, because our breaks was company times [sic]." Jennifer Atchison, another employee, testified that on May 20 Supervisor Teresa Chandler told a group of employees that "we were only to discuss union [matters] during certain times—before, after and at lunch—but break time was

company time and we were not to discuss it at that time."

Kincheloe denied ever telling employees they were prohibited from talking about the Union during breaks, and Chandler testified that she told the employees they could, if they wished, talk about the Union during their break periods. I credit the supervisors over the two employee witnesses. Studds testimony continued:

> We discussed anything we wanted to discuss . . . .
>
> I continued to discuss anything I wanted on my breaks.
>
> Q. Including union[s]?
> A. That's correct.

Employee Robin Van Burin, who was present at a meeting held by Supervisor Kincheloe, testified that, when Kincheloe spoke of employees' not talking about their union on company time, the supervisor did not specify what she meant by "company time." Van Burin also said that thereafter both she and others continued to talk about the Union during their breaktimes. And finally, in her prehearing affidavit, albeit quoting Kincheloe as saying "we should talk about it [the Union] on our own time and not on company time," Studds made no mention of breaktime at all.

Employees who are formally ordered, as these witnesses said they were, not to engage in union talk while on breaktime do not so completely and continuously ignore the directive. And an employer who directly orders employees not to carry on their union activities during time in the plant for which the employer pays them does not so indifferently pay no attention at all to a total disregard of its directive. I find that the evidence does not prove the complaint allegation respecting the break period union activity.

2. Tanya New

In the accounting department at Norfolk there are 21 regular bookkeeper-clerks and 3 senior bookkeeper-clerks; the group is supervised by 3 assistant supervisors, with each being over 7 or 8 of the clerks. All of these clerks, regular and senior, maintain records of customer accounts, with those called senior handling the more complicated matters and therefore being paid more than the other clerks. Sometimes—perhaps 1 hour each day—the senior clerks cannot keep up with their work and one of the regular clerks, then called a backup clerk, helps them. There is no added pay for this extra chore, but it does increase the chances that when a senior clerk vacancy occurs such regular clerk might progress to that position.

In October or early November 1979, Pam Caron, who was one of the assistant supervisors and who, it is conceded, was a supervisor within the meaning of the Act, went away—whether she left the Company or moved to some other location is of no moment. Faye Morris, the supervisor over all these people, recommended that Jean Jackson, then a senior clerk, be made assistant supervisor. Jackson was in fact promoted to the supervisory position on November 16, 1979. With this Jackson recommended to Morris that Concetta Warren, who had been the backup clerk, be advanced to the position of senior clerk in her place. Warren was promoted on January 1, 1980. In this group of eight or so clerks, a number were openly active on behalf of the IBEW; just how many the record does not show. But three definitely wore IBEW buttons and were outspoken; these were Warren and two regular clerks—Tanya New and Arnetta Galvin. The Respondent concedes the fact management knew of such activities by all three employees.

Warren testified that, when Jackson told her of Jackson's own promotion, Jackson also told her that Ashe, the district manager, had said that because of Warren's IBEW activities, including wearing an IBEW button, he, Ashe, "would not allow any promotion [of Warren] to Senior Clerk." Warren continued that Jackson then told her "as a friend that it would be a good idea if I stopped talking, stopped being so outspoken for the union and stopped wearing my button, if I wanted [the] promotion." At this point Warren became "angry and disappointed," and therefore removed the button and "did stop talking about it, so outwardly anyway." She was then made senior clerk, after which she again started wearing the button as she has done continuously since. Jackson did not testify, but the General Counsel stated on the record there is no allegation, or contention, that anything Jackson said or did that day violated the statute.

With Warren's becoming senior clerk, two girls wished to do the backup work to help her in her new position—New and Galvin. Both had been wearing IBEW buttons and continued to wear them. On Jackson's recommendation, Supervisor Morris chose Galvin to do backup work. The complaint alleges that New was denied the backup work because of her IBEW penchant, but the record is very vague both as to when this discriminatory action was taken and as to whether New asked for and was refused the backup work at all. In his brief the General Counsel asserts that it happened "some time between January and March 30." Other than explaining why she thought she was qualified for the job, New testified that sometime in March during an evaluation conference with Assistant Supervisor Jackson, after Galvin had long been doing the backup work, she, New, asked Jackson why New had had not been chosen to do the work instead. When Jackson started to reply that Galvin was more qualified, New interrupted with, "[I told her] not to tell me that Arnetta was a better employee than I was, because I didn't want to hear it." Jackson also said that day, still according to New's uncontradicted testimony, that an added reason was that "they . . . they didn't think it was a good idea that [New] work too closely with Cetta Warren . . . and because of [New's] IBEW activities." New testified that she "laughed" and let it go.

I am unable to conclude on this record either that New was in fact denied a request for advancement to the backup position or that the Respondent chose Galvin to do the work with an eye towards discouraging IBEW activities. To start with, there is nothing to show that New even asked for the position. Warren became senior

clerk in December, so New knew all along someone else was doing the backup work. It was only in late March, when, after reviewing New's evaluation, Jackson asked New did she have any questions, that New asked why Galvin had been chosen as backup clerk. Moreover, whatever Jackson may have said then about wanting to reduce friction among employees at such time, when an employer chooses between two equally active unioneers how can it be said that it illegally discriminated against one of them to discourage the activities both of them were carrying on?

Jackson was a supervisor in fact in March, and she should not have said IBEW activities were a factor in her managerial decision. I find that through her statement the Respondent violated Section 8(a)(1) of the Act. Beyond that I make no finding of illegality in anything the Respondent did with respect to employee New.

3. Jennifer Atchison

The story about this employee very much parallels the one about Tanya New, but it also is entangled with a very relevant contemporaneous situation which cannot be ignored. In Alexandria there is a customer contact department where a number of employees perform telephone switchboard work in separate cubicles. They receive calls from customers which require different kinds of attention, and communicate by telephone and radio with outside employees who look after the complaints. The amount of time each day, to the minute, that they are actually hooked into the communications system is recorded; it is called the employee's man-time. Outside the area of this cubicle, in a lobby where the public comes, sits a receptionist, who also operates the telephone switchboard. All, including the receptionist, are paid at the the same rate.

Atchison, a regular telephone switchboard employee, sometimes used to pinch-hit for the receptionist when she was on her breaks, out to lunch, or off from work for a while. She liked to do that. On May 18 the supervisor over her group, Teresa Chandler, told Atchison that starting on May 19 she would work at the receptionist's desk as a substitute for the regular receptionist, who was going on a 5-day vacation. Atchison worked there on May 19 and 20, but towards the end of the second day Chandler told her she would no longer do that but had to return to her ordinary duties. At the hearing the General Counsel contended that Chandler removed Atchison from the lobby desk in order to curb her pro-IBEW activities, and that therefore the Company must be ordered from now on to use her "occasionally" on switchboard "along with other backup employees." But the complaint contains no allegation of any wrongdoing by the Respondent as to this employee.

Atchison was active on behalf of the IBEW and wore a union button, and, of course, the Company knew it. Her testimony was that when removing her from the switchboard that day the supervisor told her it was because "my man-time on the other telephone was too low." Chandler then added, still according to Atchison, "it [the removal] had nothing to do with my union activities." Atchison was wearing an IBEW button that day. Atchison also testified:

> Q. . . . did anyone on behalf of the company ever say anything after that, that would indicate some other purpose in moving you away from there?
>
> A. THE WITNESS: No.

Conceding that for his belated allegation as to this employee "there is little direct evidence of discriminatory motive," the General Counsel relies entirely upon her testimony that, after removing her from the front desk, Chandler told her not to discuss the Union during breaktime. I have already credited Chandler's denial on that score. But there is another matter that significantly touches upon the removal of Atchison from the front lobby position. During the very period—May 1980—there were "rumors" running through the Company's Alexandria location about a male supervisor sexually harassing the female employees. More than once Atchison's name came up during the gossiping that took place. All the witnesses, both rank-and-file employees and company supervisors, were deliberately vague and evasive on the subject, and I find this not only understandable but also commendable. Clearly, management was trying to tone it down, to quiet the rumors, and to put an end to the complaints that were being voiced by this employee or that. At a social gathering on or about May 13 Atchison passed these rumors on to Waldo O'Hara, a safety supervisor, with at least reported chapter and verse, as her prehearing affidavit records. This got back to Chandler that same day, who then told Atchison "that the matter was being looked into and that if she would please still keep it confidential." Apparently, Atchison kept talking, and on May 19 Chandler spoke to her as follows:

> I . . . told her that I was disappointed that she had taken the matter outside of the Mark Center office, that we were going to handle it there. And I asked her why she had done so. And she just felt that management was not going to take care of it through the proper channels.

Chandler's testimony continued that the next day, May 20, she met with a number of other supervisors on the harassment problem. She added that she was already considering removing Atchison from the switchboard because of her relatively low man-time (a fact conceded on the record by Atchison), and she continued:

> [W]e also had a monitoring device on the switchboard that would enable her to perhaps listen in on conversations or make other conversations, make other outcalls, she would have that ability also. And we knew that she was responsible for taking the matter of the harassment problem outside of the Mark Center office . . . It was decided that we would take her off the switchboard.

All things considered, I do not think the probative evidence suffices to prove any unfair labor practice with respect to Atchison.

4. David Clements

In April 1980 Clements was a technical clerk, an office recordkeeping job. There was an opening for a job called service coordinator trainee, and he applied for it in writing on April 25. His application was acknowledged by Ames, the district manager, and on May 14 he was advised in writing that the job had been given to another applicant. The next day Clements wrote a letter to Ames asking for an explanation, stating he thought himself qualified, and stressing his experience and seniority. He also wrote that he thought there had been a "bias" towards him. On May 21, again in writing, Ames replied, stating that seniority was only a factor, that the position had been filled by the best qualified of the applicants, and that this was a decision for management to make. Clements then filed a grievance through the UEA; he lost at the first and/or second step, and an uncontradicted statement on the record asserts the grievance is still pending.

Clements was among the pro-IBEW activists. He personally solicited signatures to some union cards and distributed others for circulation. In the end he funneled about 50 such cards to the IBEW. There is no question as to whether the Company knew he was involved in this activity. As to management's reason for not choosing this employee over another applicant for the trainee job—the question which goes to the heart of the complaint allegation as to Clements—there is no direct evidence at all. And this the General Counsel virtually concedes, as on this record he must. It is nevertheless contended that the Respondent violated Section 8(a)(3) in not selecting Clements for the trainee job.

I think both the General Counsel and the Respondent strain the meaning of Board law in this case. In its answer the Respondent formally ask for dismissal of the entire complaint on the ground it constitutes "interference with Vepco's right to operate its business." This is another way of saying that the law—whatever it be—does not apply to this particular Company. Of course, the law may not interfere with an employer's business; provided, however, that the employer does not so operate its business—and deal with its employees—in such a way as to do violence to congressional prohibition. The Board, or any enforcement agency, is only concerned with conduct which contravenes statutory regulations. If in fact this Respondent denied Clements this particular promotion for the very purpose of putting a stop to his chosen union activity, it improperly interfered with his personal rights, not the other way around.

The General Counsel, on the other hand, misconceives the purport, and holding, of the now much discussed recent decision of the Board in *Wright Line.*[1] In his brief—arguing particularly with respect to Clements—he states the following as Board law established in the *Wright Line* decision:

> Once it has been established that a known union activist has been the object of some adverse personnel action at the hands of the Employer, the Employer incurs a burden of showing the same action would have taken place even in the absence of the employee's protected conduct.

In plain English this says that once the General Counsel has proved that an employee favors the union, his employer knows it and he is then fired or refused a job—or denied a promotion—he, the General Counsel, can rest, and, unless the employer then comes forth with convincing proof that it was not motivated by union animus in whatever it did, a presumption arises that the employer did intend to violate Section 8(a)(3) of the Act. Another way of putting this is that, whenever an employer discriminates against any known unioneer, you take it for granted he committed an unfair labor practice. This idea or guilt by presumption was born long ago in *Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883 (1957), and died an early death. There the union had the power to refer people for hiring, and it was held that from the sole fact it was a union the "inference . . . is inescapable" that the union did so with "an eye towards winning compliance with a membership obligation." *Id.* at 896. Later, in *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los Angeles-Seattle Motor Express]* v. *N.L.R.B.*, 365 U.S. 667 (1961), the Supreme Court rejected that idea, and shifted the burden of proving illegal motive in anything a respondent does back to the General Counsel.

The General Counsel's misstatement of Board law may have resulted from a blurring of two other concepts—an employer's preference for no union, or for one union instead of another, as against what has been spoken of as an employer's union animus. Evidence about an employer's opinion concerning the value of one union as against another, or even about any union at all, is one thing. The statute permits everybody—employer or employee—to have their own ideas or preferences. In contrast, proof of animus means positive evidence showing an intent, or determination, to take affirmative steps, however coercive or intimidating, to force upon the employees acceptance of the employer's view. At what point does expression of opinion end and proof of animus begin? It is proof of this element—union animus—that is very vague, if present at all, in the case at bar. I read the precedents as still holding that the General Counsel must prove a *prima facie* case in support of any 8(a)(3) allegation before an unfair labor practice can be found. In *Wright Line* other language was used, but it means the same thing: Was there a "causal relationship" between Clements' union activity and the fact he was not chosen for that particular job?

On or about the first of November 1979, shortly after the IBEW movement started, Donald Young, a building maintenance supervisor, asked Clements "what was going on with this card drive," and added that the employee did not have to answer if he did not care to do so. Clements chose to talk and said that "having these people sign these cards would benefit my co-workers and myself." On or about November 6, another supervisor, Robert Ingram, told Clements that at a supervisors' meeting Young had mentioned the fact Clements was involved with the IBEW, and that Ames, the district manager, was present. On thinking it over, Clements decided

[1] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

to talk to Ames, and on November 21 went to his office. According to Clements, "I told him that I was involved with IBEW activities and the UEA and I understood the law, that these cards could be signed during lunch hours and break periods before and after work. And, that I fully intended to abide by the law." Ames' reply, also according to Clements, was he knew this but "it was of no concern of his." This was back in November, 6 months before the May incident now said to have "a causal relationship" to Clements' union activity. Beyond this, Clements had several conversations with supervisors thereafter, some to say he intended to apply for the job and others with Ames after failing to obtain it, but no management agent ever mentioned the Union when talking to him.[2]

Whichever way I look at it—did the General Counsel prove a *prima facie* case, or does the record as a whole prove an unfair labor practice?—I cannot find affirmatively on the total evidence that the Respondent chose someone else for the position Clements wanted because he was a pro-IBEW employee. Clements explained at the hearing why in his opinion the experience he had on an earlier assignment, one that had ended 8 years before these events, did qualify him for the new job. He also stated, in his prehearing affidavit, "Recently, in my current position, my job evaluations haven't been good." I have no way of comparing his talents, or general qualifications, for the particular job with those of the person who was chosen. In Clements' only conversation with Ames, the person who made the decision, where there was mention of the Union, it was he, Clements, who chose to bring up the subject. And when he did, the manager brushed it off as no concern of his. I shall recommend dismissal of this element of the complaint also.

5. The sick leave pay announcement

In June 1980 the Company announced a new sick leave policy to all its salaried employees, applicable not only to the 3,400 who are represented under contract by the UEA, but also to all its supervisors and confidential employee who are not union-represented. How many supervisors and confidentials there are I have no way of knowing, but the number must be considerable in a company as large as this. In the past there had never been any written policy as to any of these employees that they had ever seen—in or out of the UEA contract, although in past bargaining conferences this condition of employment had been discussed by the parties. Whatever the permissible maximum or minimum benefits allowable may have been before or after the 1980 announcement, the matter always was, and still is, subject to the exercise of an element of discretion by the particular supervisor involved in any given situation.

It is now the position of the General Counsel, variously articulated, that the Respondent committed an unfair labor practice when it made the June announcement to these employees, meaning, of necessity, those who were starting to show their preference for the IBEW in place of the UEA. When the announcement was made the UEA filed a charge with the Board, alleging that Respondent had bypassed that Union and therefore violated Section 8(a)(5) of the Act. The Regional Office is still sitting on that charge, apparently unable to decide whether the announcement did or did not trench upon the statutory rights of those thousands of employees. As I read all the record before me now, including the post-hearing briefs, I am unable to understand exactly what it is that the Respondent is said to have done wrong.

At one point in his brief the General Counsel asserts the Company "reduced" the benefits being received by these employees on the day of the announcement. At another point he asserts the purpose of the announcement was to tell them instead that the Company would "provide . . . better" benefits to UEA-represented employees than the IBEW had been able to win for the production and maintenance employees it represented. And the complaint—which presumably is supposed to tell every respondent just what it did that violated the statute—does not allege that the Company either took anything away from or gave an added benefit to anybody. Instead, it reads that "by telling employees that sick leave benefits which had been altered and reduced, were identical to those received by Respondent's employees who are currently represented by the Union [UEA]" the Company committed an unfair labor practice. All this says is that the vice in the Company's action was in telling the pro-IBEW employees that the plan, as now announced, compared favorably with what the IBEW-represented employees were enjoying. This idea is repeated in the General Counsel's brief, quoted above. The record does not show what the IBEW contract benefits were, but, even if the supervisors who announced the plan to these employees lied about the comparison, I do not see how such a misrepresentation could amount to a discrimination in employment, or a violation of Section 8(a)(3), which the complaint does allege.

I make no finding of illegality in the fact the Respondent informed these particular employees about its altered sick leave plan at that time. If the Company thereby in fact reduced the benefits then being paid these employees, it took the same benefits away from the 3,000 or 4,000 others similarly affected. If its motive was to punish these few for helping the IBEW—discrimination in violation of Section 8(a)(3)—it hurt all the others for the same reason. The General Counsel asks that those among the IBEW few who were paid less sick leave thereafter be made whole for such losses. If they are to be made whole, are not the others also entitled to similar relief? To find now that the Company violated Section 8(a)(3) with respect to all the employees represented by the UEA would be, in a substantial sense, to pass judgment on the charge which the UEA filed based on the same action by the same Company. But that charge is still found wanting by the Regional Office. Perhaps the Respondent was correct at the start of this hearing when it said this case would not go forward without the presence of the UEA.

[2] There can be no finding in this proceeding that anything that happened in November 1979, or anything that any agent of the Respondent said to Clements at that time, violated the statute, for the initial charge was not filed until June 30, 1980. The General Counsel does not contend otherwise.

However the act of making this sick leave announcement be described, the crucial element must be whether the motive which inspired it was to lessen the chances of the IBEW's coming into this Company. An employer who is determined to keep the old union in its company does not do injury to such a great number of employees still adhering to the union it prefers. Especially would he not take away a benefit from all his supervisors to teach a lessen to the few unioneers. If this announcement caused any harm it hurt the old union more than the new one, this if only because of the incredible discrepancy in the relative number of employees affected. Much more convincing is the explanation given by management witnesses as to why they did what they did. They said the laxity in the implementation of the old policy, which left too much to the individual discretion of this supervisor or that, made necessary some form of clarification. In the total circumstances I see no reason for not accepting this as a legitimate business explanation. Certainly, there is no direct evidence of any other ulterior motive.

6. One employee, one button

One day Van Burin, one of the regular customer contact representatives who worked in the cubicles, was put at the receptionist's desk in the lobby, where she also worked on the telephone switchboard. She testified that in July 1980 a supervisor, Marian Trenis, said she preferred that Van Burin remove the IBEW button she was wearing while working in the lobby. Van Burin refused to remove it and continued to work at that station for 2 more months, always wearing the button.

Van Burin also testified that 2 months after the July conversation with Trenis, another supervisor—Terry Bergeron—removed her from the receptionist's desk and put her back on her regular post in the telephone cubicles because she refused that supervisor's request, once again, to remove the union button. For reasons that I cannot understand, the General Counsel clearly stated there is no contention that the removal of Van Burin from that job was in any way illegal or improper. He spoke of there being "three complaints issued," but as to what he was talking about I have no idea. It is very much like the case of David Clements, explained above, where the UEA filed a charge with the Board in which it alleged the Company committed some kind of unfair labor practice in the action involving Clements. This business of multiple charges and complaints serves only to befuddle whatever issue is really raised here.

In any event, as I sum it up, the only question to be decided on this complaint is whether that one statement by Trenis to Van Burin—that it would be better if she removed the IBEW button while working in the lobby, a statement ignored with impunity by the employee—violated the statute.

The lobby is the one place in this location of the Company where the public is received. There are chairs for people who have to wait—customers, salesmen, applicants for employment, etc. Part of the receptionist's duties is to deal with all these vistors. While the unusual attractiveness of the union button worn by so many of the employees in this instance furnishes no justification for any prohibition against wearing them, there is much to be said for the Respondent's argument that it had a right to keep the question of employees' quarreling among themselves between two unions away from the public which comes to do business here. After all, union activity is something that concerns the Company's employees, not the people with which it does business. Compare: *Marshall Field & Company*, 98 NLRB 88 (1952).

More importantly in this case is the fact that this was a most miniscule incident in the IBEW campaign that was being conducted. People wore buttons all over the place, and no one was ever criticized for it. Further, the record is replete with testimony about assurances voiced by management representatives that no one would suffer discrimination, or any kind of restraint, because of such activities. Even were I to find that the one statement by Supervisor Trenis to Van Burin technically amounted to a violation of Section 8(a)(1), the offense would not warrant a full Board finding and a restraining order. The only other unfair labor practice found on this entire record is the statement by Supervisor Jackson to employee New that one reason for not temporarily assigning New to another position was not to encourage IBEW activities. Given the size of the Company, the great number of employees involved, and the fact that no substantive unfair labor practices have been found, I will recommend instead dismissal of the complaint in its entirety.

[Recommended Order for dismissal omitted from publication.]